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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1942

No. 597

■

ADA McSPARRAN, *Petitioner*

v.

CITY OF PORTLAND, *Respondent*

■

Petition for Writ of Certiorari to
The Supreme Court of the State of Oregon

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Attorney for Petitioner

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Petition for Writ of Certiorari to The Supreme Court of the State of Oregon

TO THE SUPREME COURT OF THE UNITED STATES:

The above named petitioner presents this her petition for writ of certiorari and shows unto the Supreme Court of the United States as follows:

A

Summary Statement of Matters Involved

1. *Statutory Provision Sustaining Jurisdiction.*

Section 237 (b) of the Judicial Code [28 U. S. C. A. 344 (b)] sustains jurisdiction of this Court.

2. *Validity of the City Ordinance Drawn in Question.*

The legislation here drawn in question is an ordinance of the City of Portland, regulating and in some instances prohibiting employment of women and children within the City of Portland, reading as follows:

> "Section 7. SELLING OF NEWSPAPERS BY BOYS UNDER TEN YEARS AND GIRLS UNDER EIGHTEEN YEARS. It shall be unlawful for any parent, guardian, custodian or person having charge or control of any boy under the age of ten years or of any girl under the age of eighteen years to permit any such boy or girl to sell, expose, or offer for sale on any street any newspaper, magazine or periodical; and it shall be unlawful for any such boy or girl to sell, expose or offer for sale on any street any newspaper, magazine or periodical."[1] R. 77, 90.

3. *Date of Judgment and Order to be Reviewed.*

The judgment here sought to be reviewed is that rendered by the Circuit Court of Multnomah County, Oregon, on April 16, 1942, and entered of record on June 8, 1942. (R. 60-62) Within the time required by law, petitioner duly appealed to the Oregon Supreme Court on the grounds that the ordinance was unconstitutional and as applied abridged the petitioners fundamental personal and civil rights contrary to the Federal Constitution. (R. 66-67, 70-72) The appeal was duly and timely docketed in the Oregon Supreme Court. (R. 97) The City of Portland filed a motion to dismiss, on the grounds that the Oregon Supreme Court did not have jurisdiction, alleging that under the law of Oregon that court did not have jurisdiction to review an appeal from a judgment rendered on trial de novo of an action originating in the Municipal Court of the City of Portland. R. 93.

On September 22, 1942, the Oregon Supreme Court dismissed the appeal. (R. 94, 97) Under a prior decision in *Portland* v. *White,* 106 Or. 169, 211 P. 798, it was inferred that the Oregon Supreme Court would have jurisdiction of

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[1] Petitioner's daughter Rhae was nine years of age. Jacqueline, age 12 at the time of petitioner's arrest. Both were within the age limit included in the ordinance.

an appeal from the Circuit Court of a case originating in the Municipal Court where a constitutional question is involved. On the authority of this case, petitioner considered it necessary to exhaust her remedies in the state courts in harmony with the correct practice of this Court announced in the case of *Western Union Telegraph Co.* v. *Hughes,* 203 U. S. 505; *Kentucky* v. *Powers,* 201 U. S. 1, 37; *Virginia Ry. Co.* v. *Mullens,* 271 U. S. 220, 222; *Bacon* v. *Texas,* 103 U. S. 207, 215. Therefore the judgment to be reviewed by this Court is that of the Circuit Court of Multnomah County, which did not become final under the appellate procedure of Oregon until September 22, 1942, the date of dismissal of the appeal by Oregon Supreme Court. See *American Ry. Expr. Co.* v. *Levee,* 263 U. S. 19, 20; *Tumey* v. *Ohio,* 273 U. S. 510, 515; *Hetrick* v. *Lindsey,* 265 U. S. 384.

4. *Timeliness.*

The time for filing petition for writ of certiorari in this Court expires December 22, 1942. This petition is filed within that time.

5. *Time and Manner in which Questions Raised Below.*

By motion to dismiss filed in the Municipal Court (R. 2), and by motion for directed verdict duly urged at the close of all the evidence in the Circuit Court (R. 55), petitioner duly complained that the ordinance was invalid and void as applied to her because it abridged her right to freedom of press, of speech, and of worship of ALMIGHTY GOD, contrary to the First and Fourteenth Amendments to the United States Constitution. (R. 58, 60, 61, 66-67, 68-69) The Circuit Court overruled the motion for directed verdict and held that the ordinance was constitutional and that it did not violate rights of the petitioner guaranteed under the First and Fourteenth Amendments to the Federal Constitution. R. 58, 61, 66-67, 68-69.

In Oregon Supreme Court petitioner duly questioned the

validity and constitutionality of the ordinance. (R. 95, 96) The Oregon Supreme Court did not pass on the Federal question thus presented, but dismissed the appeal for want of jurisdiction. R. 94-96.

6. *Opinions of the Courts Below.*

The opinion of the Municipal Court does not appear in the record and is not reported.

The Circuit Court's opinion appears in the judgment. R. 61.

The opinion of Oregon Supreme Court is not *officially* reported, but is unofficially reported in 129 P. 2d 65, and appears in the record. R. 94-96.

7. *Statement of Facts.*

This quasi-criminal action originated in the Municipal Court of the City of Portland, in which court petitioner was charged by complaint with an alleged violation of the foregoing ordinance. The complaint under which the prosecution was instituted and the conviction obtained reads as follows:

> "The said defendant is accused in this complaint of violating Ordinance No. 32927 of said City of Portland, entitled, 'An Ordinance to protect women and minor children, and declaring an emergency,' passed by the Council June 6, 1917, as follows:
>
> "The said defendant on September 13th, 1941, in the City aforesaid, did willfully and unlawfully allow her daughters, Jacqueline, age 12 years, and Rhae, age 9 years, to sell or expose for sale magazines on the street, within the corporate limits of said City of Portland, Oregon, whereby the peace and quiet of said City was disturbed, contrary to the Ordinance in such case made and provided." R. 1.

Petitioner duly appealed to the Circuit Court for the County of Multnomah, where the case was tried de novo.

Petitioner is one of Jehovah's witnesses. She has brought up her children in the nurture and admonition of the Lord and taught them that the only way that they can obtain life everlasting on the earth is likewise to be Jehovah's witnesses. Jacqueline, age 12, is one of Jehovah's witnesses. (R. 5, 44) Rhae McSparran, age 9, is one of Jehovah's witnesses. R. 48, 49.

On or about September 13, 1941, between about 9:30 and 10:30 o'clock A. M., petitioner and her two daughters had stationed themselves on the sidewalk on Fourth and Washington Streets, in the City of Portland. The two daughters were standing on either side of their mother, and neither the daughters nor petitioner were blocking, or in any manner interfering with, the normal movement and flow of traffic on said sidewalk, nor were they cluttering the streets with papers or debris or otherwise. They stationed themselves at this place for the purpose of distributing the *Watchtower* and *Consolation* magazines. They were equipped with canvas bags on which were printed these words, "The Watchtower and Consolation, 5c per copy." While thus standing and wearing the bags, they held in their hands the *Watchtower* and *Consolation* magazines, which they offered to the people who passed. To anyone interested in these magazines but who lacked the five cents they furnished a copy of same without charge, provided the recipient promised to read the contents thereof. Contributions of money thus received were used to defray the cost of printing and distributing more of said magazines.

Both magazines named are Scriptural periodicals containing Bible references, and are not subversive, nor do they advocate the use of force by other persons or anyone to overthrow the government. *The Watchtower* strictly adheres to the Bible as authority for its utterances, being strictly free and separate from all religion, parties, sects

or other worldly organizations. It is wholly and without reservation for the Kingdom of Jehovah God under Christ His beloved King. It is not dogmatic, but invites careful and critical examination of its contents in the light of the Scriptures. It does not indulge in controversy and its columns are not open to personalities. *The Watchtower* advocates that Jehovah God is the only true God, Maker of heaven and earth, and the Giver of life to His creatures; that God created the earth for man, originally made perfect, and placed man upon it; that man willfully disobeyed God's law and was sentenced to death, and by reason thereof, death came upon all the descendants of the first man, Adam; that Jesus Christ was made human through miraculous conception and birth and suffered death in order to provide a redemptive price, for those only of mankind who desire to serve Jehovah God and live; that Jesus Christ was thereafter raised unto heaven and placed at the right hand of Jehovah God, His Father, to be the King of Jehovah's everlasting government, The THEOCRACY, and thereafter proceeded to oust the adversary Satan and his legion of wicked angels from heaven; that Satan is now attempting to turn all mankind away from God and into destruction and violently to oppose and destroy those who dare to act as witnesses for Jehovah God, His Word, and His Kingdom, as did Christ Jesus when on earth; that Christ Jesus is the great Executioner for the Supreme Judge and is now proceeding to execute judgment of everlasting destruction upon Satan's governments and all supporters thereof, invisible and visible in the earth, in Jehovah's battle at Armageddon, which is very near, following which there will be established completely and fully in the earth the righteous government, the "new world", for which Christ Jesus taught all true servants of Jehovah to pray. An examination of *The Watchtower* conclusively proves that its pages from cover to cover of each issue contain a written sermon explaining the foregoing matters in greater detail.

Petitioner and her two minor children believed that it was their respective duty to Jehovah God, in obedience to their covenant conscientiously entered into with Him, to serve Him by advertising and preaching the gospel of God's Kingdom under Christ Jesus by public appearance upon the streets and there to distribute Bible literature, to wit, the *Watchtower* and *Consolation* magazines, periodicals containing explanations of God-given prophecies which they believed, and at the same time they received from some persons money contributions to aid in printing more like literature. The magazines contained printed sermons. While they were so acting, petitioner and her two daughters were stopped and accosted by a policewoman of the City of Portland. Each was requested by the policewoman to discontinue such activity. They refused. Whereupon Petitioner was arrested and charged with an alleged violation of the ordinance in question. R. 4-12, 17-38.

Petitioner is an ordained minister of Jehovah God, and it is her conscientious belief that by reason of a covenant made by her with Jehovah God she must preach and proclaim the gospel of God's Kingdom under Christ Jesus by presenting the printed books, booklets and magazines in question to the people of the State of Oregon. Such manner of preaching the gospel is the occupation of petitioner aside from her duties as a housewife, and she conscientiously regards it as her privilege, right and duty to instruct her children and to bring them up in the nurture and admonition of the Lord, which required that they, too, worship Jehovah by acting with their mother in the distribution of such literature to people on the streets; and that petitioner educate her children as the Constitution and laws of the United States provide that a parent may do without let or hindrance; and that the acts of her children aforesaid were, and are, voluntary acts of worship of Almighty God in the relationship between child and the Creator, Almighty God JEHOVAH, and the parent, according to said instructions. R. 17-25, 43-49.

B

Questions Presented

By reason of the foregoing, there were seasonably presented to the courts below and there are now presented to this Court for review substantial Federal questions as follows:

(1) Is the ordinance in question unconstitutional on its face and as construed and applied because abridging and denying petitioner's right to freedom of press, freedom of speech, and freedom to worship ALMIGHTY GOD according to His commands written in the Bible and the dictates of her conscience, contrary to the First and Fourteenth Amendments to the United States Constitution?

(2) Does the ordinance prohibit or abridge petitioner's right to teach and to bring up her children in the nurture and admonition of the Lord as required by Jehovah God, so as to violate petitioner's right of freedom of speech contrary to the First and Fourteenth Amendments to the United States Constitution?

C

Reasons Relied on for Allowance of Writ

The holding in the case at bar is directly contrary to the holding of the highest court of another state that the law in question violates the rights of Jehovah's witnesses. See *State* v. *Richardson,* .. N. H. .., 27 A. 2d 94. That case expressly holds that a state statute very similar to the ordinance here in question could not be lawfully applied to the activity of Jehovah's witnesses.

The holding of this Court in prior decisions, although not directly in conflict with the decision of the Circuit Court in this case, does announce clear principles of law which do not allow the conclusions reached by the Circuit Court in the case at bar. See *Pierce* v. *Society of Sisters,* 268 U. S. 510; *Meyer* v. *Nebraska,* 262 U. S. 390; *Allgeyer* v. *Louisiana,* 165 U. S. 578, 589; *Berea College* v. *Kentucky,* 211 U. S. 45, 67; *Missouri ex rel. Gaines* v. *Canada,* 305 U. S. 337; *Farrington* v. *Tokushige,* 273 U. S. 284.

Here is presented and claimed a substantial Federal question not heretofore determined by this Court. The court below has decided a Federal question in a way probably not in accord with the applicable decisions of this Court.

A most grave and serious question is here presented.

The point to be determined is whether or not this Court will permit to stand a judgment of a state court which approves of the regimentation of American citizens through "framed" and misapplied laws enacted and originally directed at other activities, but which have been illegally construed to abridge unalienable rights of freedom of parents to educate their own children, freedom to teach children God's Word and to bring them up in the nurture and admonition of the Lord, freedom of press, freedom of speech, and freedom to worship ALMIGHTY GOD, con-

trary to the First and Fourteenth Amendments to the United States Constitution.

The decision of the court below does this very evil thing, and abridges the unalienable and constitutional rights of petitioner.

The court below has so far departed from recognized procedure under the Constitution in American courts as to call for exercise of supervision of this Court to halt the same, and to correct the errors of the court below.

It is submitted that this case is one calling for exercise of this Court's supervisory powers under Section 237 (b) of the Judicial Code [28 U. S. C. A. 344 (b)] and Rule 38, paragraph 5 (a), of the Rules of this Court.

WHEREFORE petitioner prays that this Court issue a writ of certiorari directed to the Supreme Court of the State of Oregon, commanding such court to certify to this Court for review and determination on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case above described, so that the judgment and decree of the Circuit Court of Multnomah County convicting and punishing petitioner for alleged violation of the ordinance in question be reviewed and here set aside, and reversed and held for naught; and that your petitioner be granted such other and further relief in the premises as to this Court may seem just and proper under the extraordinary circumstances.

ADA McSPARRAN, *Petitioner*

By HAYDEN C. COVINGTON

Attorney of Record

SUPPORTING BRIEF

Assignment of Errors

The petitioner assigns the following errors in the record and proceedings of said cause:

The Circuit Court of Multnomah County, Oregon committed reversible error in rendering a judgment against petitioner because

(1) The ordinance as construed and applied abridges and denies petitioner's rights of freedom to bring up children in the nurture and admonition of the Lord and to direct the spiritual welfare of said children and their proper worship of Almighty God Jehovah as directed in His Word, contrary to the First and Fourteenth Amendments to the United States Constitution.

(2) The ordinance as construed and applied abridges and denies petitioner's and her children's rights of freedom of speech, press, and worship of Almighty God Jehovah, contrary to the First and Fourteenth Amendments to the United States Constitution.

ARGUMENT

This noble and honorable court is now called upon to exercise its power to review a judgment of the state court for the purpose of protecting the most sacred of all human rights from encroachment by misapplied laws. That right is the God-given duty and privilege of parents to raise their children up in the nurture and admonition of the Lord and direct the children in their proper worship or service of Jehovah God.

The court below encroached unlawfully upon this right by applying an ordinance directed at commercial exploitation of children through unlawful *child labor*. It has been wrongly misinterpreted by the police officials of Portland

to cover the charitable preaching, worship and service to Almighty God by petitioner and her minor children. The *superior right* of petitioner as a parent to properly direct the spiritual welfare of her children by permitting them to engage in Godly practices not inimical to their own welface or the welfare of the state cannot be overcome by misapplication of an ordinance directed at other activity. The undisputed evidence shows that the acts engaged in by petitioner and her minor children were acts of worship of Jehovah God. Such activity does not violate the laws of morality, nor infringe personal rights of others, nor present a clear and present danger against the peace and dignity of the state. The judgment of the court below is void and should be reversed because petitioner's unalienable constitutional rights have been illegally abridged by the wrongful application of the ordinance.

The undisputed evidence shows that petitioner did not profit from the activity of her children in distributing the literature. There is no showing or contention that the activity in which they were engaged was commercial. The petitioner did not compel her children to engage in the service of the Lord but permitted them to act as Jehovah's witnesses only when they volunteered. She did not object to their engaging in such activity. The children had entered into a covenant with Jehovah to serve Him and considered it their bounden duty to preach the gospel publicly upon the streets by means of distribution of the literature in question.

Marriage and childbearing is God's arrangement for all humankind that shall live on the earth. It is beyond the power of the state to interfere with or abridge the right of all persons within its boundary to *procreate*. Even this right cannot be denied to criminals. *Skinner* v. *Oklahoma*, 316 U. S. 535. *A fortiori* the state cannot interfere with and abridge the parents' right to bring up children in a way acceptable to their own judgment so long as it is not inimical to the welfare of the children or the well-defined interest of the state.

The children must be taught by the parents to be obedient to the Lord and His commandments or rules found in the Bible. Upon the parents is placed the duty to teach their children morality, honesty, integrity, obedience and meekness and, above all, the commandments of Almighty God, JEHOVAH.

Upon all parents who are in a covenant to do God's will there is laid the duty and specific obligation to teach their children the Word of God and it is the duty of the children to obey their parents who give such instruction. The parent will be diligent to bring his children to congregations where the commandments of Almighty God are studied and discussed. The children are permitted to participate therein so that they might learn the way of righteousness and how they might receive life everlasting. When Moses stood before Jehovah's typical covenant people on the plains of Moab and delivered the instruction from Jehovah he knew that soon thereafter the children would take the place of their parents in the ranks of God's army. Forcefully he urgently reminded the parents of their duty to their children. He urged upon them diligence and faithfulness in teaching the truth to their children. That was important then; the fulfillment thereof is of greater importance now. See Deuteronomy 4:9, 10; 6:5-8; 11:18-21; 12:28; 32:46. The apostle of Christ Jesus also states the command thus: "And, ye fathers, provoke not your children to wrath; but bring them up in the nurture and admonition of the Lord." (Ephesians 6:4) The children also are commanded: "Children, obey your parents in the Lord; for this is right. . . . Honour thy father and mother, which is the first commandment with promise, that it may be well with thee, and thou mayest live long on the earth."—Ephesians 6:1-3.

"Nurture" means to discipline and train the child in the way of righteousness; and such way of righteousness God has marked out in His Word. "Admonish" means to teach and instruct; to counsel and advise the children of and in accord with the expressed will of God set forth in the

Bible. Parents who failed thus to instruct their children would be provoking their children to do wrong or to wrath. The words "right" and "righteous" are from the same root and mean the same thing.

The petitioner was glad to discharge her responsibility under the law to instruct her children in righteousness and obedience, and her children were joyfully obedient to the commandments of the Lord. The duty of the parent does not end with instruction. If the child indicates a willingness to do the will of God, the parent is under the obligation to aid the child in taking the necessary steps to serve the Lord by doing the overt act of participating in the positive command of preaching the gospel of God's kingdom to others. The petitioner did this and took her children with her in the preaching activity.

To permit the child to *believe* in righteousness and to refrain from *practicing* right is entirely wrong. "For as the body without the spirit is dead, so faith without works is dead also." (James 2:26) "Let your light so shine before men, that they may see your good works, and glorify your Father which is in heaven." (Matthew 5:15, 16) It is therefore the duty and privilege of parents and children to *practice what they preach* by consistently acting as Jehovah's witnesses before men. This the petitioner and her children have done on the streets of Portland by distributing the *Watchtower* magazine to persons of good will toward Almighty God.

In this they are doing the will of Jehovah and by their conduct they say: "I delight to do thy will, O my God." (Psalm 40:8) "Thy word is a lamp unto my feet, and a light unto my path. . . . My tongue shall speak of thy word; for all thy commandments are righteousness."—Psalm 119:105, 142, 144, 172.

It cannot be said that the children are too young to be permitted thus to worship and serve Jehovah God. The state has no authority or power to tell a child at what age it can begin practicing the requirements of Almighty God

taught it by the parent. Thus to allow the state to intervene would forever destroy and end the unalienable American heritage of the right to maintain a home, raise children and follow generally the pursuits of happiness enjoyed by a free people. The state can intervene with respect to the care and education of the child only when the parent "neglects" or "misuses" the child to such an extent as to endanger its welfare and the interests of the state. As long as the parent does not violate this fundamental rule the state cannot interfere with the "religious" practices of the parents and children.

It is not contended that petitioner neglected her duty in bringing up the children. It is not contended that she is not providing them a proper home or education, or permits them to *run at large*. It is not contended that she is exploiting the children or keeping them away from public schools. The undisputed evidence shows that the only act made the basis of the *complaint* is that she permitted the children to worship Jehovah God according to the desires of their heart and mind and the dictates of God's Word by distributing the magazine and accepting money contribution.

There is no evidence that there was a sale or that the children were offering or exposing for sale periodicals or magazines; on the contrary, the evidence clearly shows that they were preaching the gospel. "Sale" is necessarily confined to a commercial object, such as ordinary articles of merchandise. It cannot and does not include the distribution of Bible literature by one of Jehovah's witnesses simultaneously receiving money contributions. Money so received is similar to that received by recognized religious organizations or clergymen in the church edifices. When one goes to such church buildings and contributes twenty-five cents, more or less, it cannot be said that the sermon was "sold" to him. The charitable nature of the activity is not changed by the fact that the one contributing the money *thought* or testified that he "bought" a sermon or concluded that it was *sold* to him.

An examination of the entire evidence shows that petitioner's activity is charitable and non-profit. It is not contended that any of the literature was held back from anyone for want of money contribution. The evidence shows that petitioner and her children gave away free of charge as many pieces of literature to non-contributors as contributors of money had accepted from them.

There is no contention that petitioner individually profited or gained anything from the contributions given her children. The entire case is based on the false conclusion by the police who testified that a *sale* was made by the children. Constitutional rights are not dependent upon whether the one exercising them refuses to accept money contributions to aid the good work done by him. If such a distinction is sustained then the purposes of the ordinance to prevent exploitation of children could be circumvented by instructing the children to refuse to accept or offer to accept money contributions. Surely the inherent liberty of the people does not depend upon such a *fine* distinction as that.

The ordinance can be no more constitutionally applied to petitioner than could the ordinance be validly applied to Catholic priests who constantly employ and use "altar boys" in the traditional Catholic mass service throughout the nation and in the City of Portland. If this law can be sustained as to Jehovah's witnesses, then there is nothing to prevent the states and cities from prosecuting Catholic priests and parents of Catholic children who permit them to act as "altar boys" in the performance of their religious ceremonies and traditional modes of worship.

The act of serving Almighty God by preaching the gospel publicly on the streets is to petitioner and her children and other of Jehovah's witnesses a most sacred practice, and the courts should be reluctant to infringe upon the exercise of that right because of conscience' sake. The situation presented here is much different from that of a child employed to sell newspapers on the streets. Here the child is engaged in the sacred act of witnessing to the name

and honor of Almighty God, Jehovah. The words of the New Hampshire Supreme Court (*In re Roland Lefebvre et al.*, 20 A. 2d 185) seem appropriate and fitting here:

> "Loving parents who do their best for their children in support, nurture and admonition are of more worth than pecuniary means. Righteous and generous motives may be of more importance than notions that chime with majority opinions of what is good form or what is the best method of teaching patriotism. . . . But in view of the sacredness in which the State has always held freedom of religious conscience, it is impossible for us to attribute to the legislature an intent to authorize the breaking up of family life for no other reason than because some of its members have conscientious scruples not shared by the majority of the community, at least provided those scruples are exercised in good faith, and their exercise is not tinged with immorality or marked by damage to the rights of others."

It is noticed that the construction given the terms of the ordinance by the police of Portland permits a parent of a child of the prohibited age to allow the child to wander about aimlessly upon the streets with nothing to do without being subject to the terms of the ordinance. At the same time the ordinance is construed in such a manner as to permit the prosecuting of a parent who honestly directs his child in constructive activity for the child's welfare as well as that of the persons to whom the child ministers. Such construction makes the ordinance unreasonable and arbitrary.

Our views on the questions here presented are well summarized by the Supreme Court of New Hampshire in the case of *State* v. *Richardson*, 27 A. 2d 94, involving a statute of that state identical in substance and purpose with the ordinance in question here. The statute (P. L., c. 118, s. 21) provides that boys under ten and girls under sixteen shall not "sell or expose or offer for sale newspapers, magazines,

periodicals or other merchandise in any public street or public place." The New Hampshire statute was held to be inapplicable to the identical activity as that here involved. The reasons there expressed present forceful argument here that for the same cause the ordinance here should be held unconstitutional. Chief Justice Allen said:

> "It is thought that the activity in which the boy under the defendant's leadership was engaged is not within the tenor and spirit of the prohibition of sales in public places. His service was not fairly to be classified as a business enterprise or as work, in the ordinary sense of words. To use a common expression, he was not exploited to help as a source of family income and material resources or to promote the defendant's financial welfare. Any exploitation of the boy was for other than pecuniary ends. He was performing a service under his mother's auspices, and the few cents he received were no impaction on the controlling religious character of his service, so as thereby to transform it into one of employment or work. The money-making feature of his service is too insignificant to receive notice as a factor modifying a strictly religious engagement into one with business attributes. The boy was not a newsboy on the occasions in question, and an occupational element, even of temporary duration, is not to be ascribed to his activity. Nor is there any claim that his education required by law was disturbed or menaced....
>
> "The State's argument that the statute was partly designed to protect the morals of young children by keeping them off the streets and out of public places, is not impressive. So far as concerns the case, the boy was in his mother's custody and general charge. In respect to the statute, it would be a clearly unreasonable discrimination that young persons might be on the streets with nothing to do, while others might not if they had some occupation there.

" . . . The facts do not constitute a mischief or evil which the legislation undertakes to suppress."

The children were preaching, ministering the gospel message, not *selling*. Preaching the gospel of the kingdom of God is the proclaiming to others the Scriptural truths of and concerning Jehovah God and His Kingdom, The Theocracy, under Christ Jesus. From the Scriptural standpoint it is not unusual that a child should teach and preach the gospel at a very early age. When Jesus was twelve years old and long before He was anointed with the holy spirit, he preached and taught as one of Jehovah's witnesses in the temple where he confounded the wise men and astonished them with his wisdom and statements. (Luke 2:46, 47) Timothy, long before he reached the age of maturity and while yet a small child, also taught and preached. He accompanied the apostle Paul, who preached publicly in the market places, on the streets and from house to house. See Acts 16:1-3; also 1 Timothy 4:12 where Paul writing to his 'son of faith', Timothy, said: "Let no man despise thy youth; but be thou an example of the believers, in word, in conversation, in charity, in spirit, in faith, in purity." Samuel was consecrated for service in the temple when very small and of tender age.—1 Samuel 1:24; 2:11, 28. See also Jeremiah 1:6, 7.

Christ Jesus condemned the Pharisees because of their effort to prevent and ridicule the following of little children after him. He said: "Suffer little children to come unto me, and forbid them not; for of such is the kingdom of God." (Luke 18:16) See also Luke 11:52; Matthew 18:1-6; Psalm 8:2; 148:12, 13; Proverbs 8:32.

Therefore it is unreasonable and unscriptural to contend that it is not proper for a child to engage in publicly giving praise to Jehovah God by acting as His witness in distribution of literature explaining Bible prophecy and present day fulfillment thereof. It should be borne in mind that this is the primary way that Jehovah's witnesses worship and

serve Almighty God and to deny this right to the children through punishing the parent because the children exercise such right is to deny to them freedom of worship of Almighty God, which freedom alone gives freedom from want and from fear.

The holding of the court below is in conflict with this court's decision in the case of *Meyer* v. *Nebraska,* 262 U. S. 390, where was set aside a conviction of a person who taught the German language to children in public schools contrary to a state statute. It was held that the statute infringed the right of the individual to marry, establish a home, bring up children and to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men. The judgment of the court below is contrary to this court's holding in *Pierce* v. *Society of Sisters,* 268 U. S. 510, where the Oregon Compulsory Education Law requiring all children to attend *public* schools unreasonably abridged the constitutional right of parents to direct the upbringing and education of children under their control. See also *Allgeyer* v. *Louisiana,* 165 U. S. 578, 589; and *Berea College* v. *Kentucky,* 211 U. S. 45, 67.

The sound and constitutional rule is that the liberty of the parent may not be interfered with under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the State to effect. Determination by the legislature of what constitutes proper exercise of police power is not final or conclusive but is subject to supervision by the courts. *Lawton* v. *Steele,* 152 U. S. 133, 137. See *United States* v. *Carolene Products Co.,* 304 U. S. 144, 152; *Schneider* v. *State,* 308 U. S. 147, 162-164; and *Herndon* v. *Lowry,* 301 U. S. 242.

Before these inherent freedoms can be abridged there must be presented some clear and present danger that the act will immediately invade rights of others and be inconsistent with the welfare of the children, and be immediately inconsistent with the peace and safety of the state. *Bridges*

v. *California,* 314 U. S. 252. Admittedly there is no clear and present danger that the evil will result that is claimed by the state in this case. Also there is no rational relation between the ends aimed for and the means employed by the ordinance. See Freund, *The Police Power,* pp. 133, 497.

If the validity of this ordinance as construed and applied to the petitioner be sustained there is nothing to prevent police officers of the City of Portland from instituting proceedings in the Court of Domestic Relations of the State of Oregon for the County of Multnomah to deprive petitioner of the custody of the children. Indeed section 16, subsection (c), of said ordinance provides that if the child is under 18 years of age and is permitted by the parent to violate the ordinance, then the police shall apprehend the child as a juvenile delinquent to be brought before said juvenile court and dealt with according to law.

We submit that the next logical step for the Portland officials to take is to break up the homes of Jehovah's witnesses because of the faithfulness of their children to their covenant to serve Jehovah God. Indeed it is true concerning Jehovah's witnesses today as it was in times of old with Jehovah's faithful prophet Daniel. See Daniel 6:5 where it is written, "Then said these men, We shall not find any occasion against this Daniel except we find it against him concerning the law of his God."

The ordinance is not regulatory but is clearly unconstitutional and void because it is absolutely prohibitory as construed and applied to activity of the petitioner and her children. "Ordinances absolutely prohibiting the exercise of the right to disseminate information are, *a fortiori,* invalid." (Reed, *J.,* in *Jones* v. *Opelika,* 316 U. S. 584, 595-596.) Ordinances of Los Angeles, Milwaukee and Worcester containing prohibitory provisions were declared invalid and unconstitutional in *Schneider* v. *State,* supra. In *Hague* v. *C. I. O.,* 307 U. S. 496, 501, 518, the ordinance declared unconstitutional forbade any person to "distribute or cause to be distributed or strewn about any street or public place

any newspapers, paper, periodical, book, magazine, circular, card, or pamphlet." See also *Thornhill* v. *Alabama*, 310 U. S. 88, and *Carlson* v. *California*, 310 U. S. 106.

The ordinance has been construed so as to read, in effect, as follows: 'It shall be unlawful for any child under the age of eighteen years to worship Almighty God within the City of Portland.' If the ordinance expressly so provided all persons, even the least informed, would admit that it was void and a nullity. From the construction given the ordinance and its application in this case it must be conceded that it is unconstitutional and void for the reason that it abridges and prohibits worship of Almighty God by any girl under the age of eighteen years, and denies the right of the parent to direct that girl in the way she should go.

Conclusion

It is submitted that this case is one calling for the exercise by this Court of its supervisory powers under Section 237 (b) of the Judicial Code [28 U.S.C.A. 344 (b)] and Rule 38, paragraph 5 (a), of Rules of this Court. To that end this petition for writ of certiorari should be granted so as to correct the assigned errors committed, and the judgment rendered, by the Circuit Court of Multnomah County, Oregon, against petitioner, which judgment should be reversed.

Respectfully submitted,

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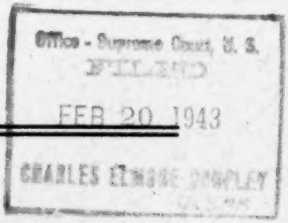

In

The Supreme Court

of the United States

OCTOBER TERM, 1942

No. 597

ADA McSPARRAN,
Petitioner,

vs.

CITY OF PORTLAND,
Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

On September 13, 1941, the petitioner, Ada McSparran, was charged in the Municipal Court of the City of Portland, Oregon, with violating Ordinance No. 32927 by allowing her two daughters, Jacqueline, age 12 years, and Rhea, age 9 years, to sell or expose for sale, magazines on the street

(Tr. of record p. 1). She interposed a motion to dismiss the case on the ground that the ordinance was in conflict with the Federal Constitution in that it restricts freedom of speech, freedom of the press, and freedom of worship of Almighty God, and in violation of the 14th Amendment of the Federal Constitution (Tr. p. 2). On September 20, 1941, she was found guilty and fined $21. She appealed to the Circuit Court of the state of Oregon for the county of Multnomah where the case came on for trial de novo on April 16, 1942. There was no motion here to dismiss the case as in the lower court. The evidence was taken as shown by the Tr. pp. 3-56.

On June 8, 1942, a judgment was entered in the Circuit Court wherein she was found guilty and fined $21, and it was further ordered that the fine be suspended. An attempt was then made to appeal to the Supreme Court of the state of Oregon. A notice of appeal, undertaking and transcript were served and filed. The transcript there filed was apparently the same as the transcript now presented to this Court. On August 22, 1942, the City of Portland moved to dismiss the appeal, and on September 22, 1942, the Supreme Court held that it had no jurisdiction and ordered the appeal dismissed (see Tr. pp. 94-96). Application to this Court for a writ of certiorari was made on or about December 21, 1942, more than six months after the judgment of the Circuit Court.

POINTS, AUTHORITIES AND ARGUMENT

The respondent objects to the issuance of a writ of certiorari on the grounds (1) that the Supreme Court of Oregon had no jurisdiction of the appeal, passed upon no federal question, and therefore a writ of certoriari to that Court would be improper and not present a federal question to this Court; (2) that if the petition here be construed as applying for a writ to the Circuit Court, the application comes too late, for it is more than three months after the entry of judgment in the Circuit Court, and there was no extension of time applied for or obtained; (3) that the record upon which the petition for a writ of certoriari is based fails to show that a federal question was properly presented to the Circuit Court, and therefore fails to show that this Court has jurisdiction to issue the writ; and (4) that if the petition be considered on its merits it fails to disclose any merit or any federal question of importance or of unusual character, such as to move this Court to review the action of the Circuit Court for Multnomah county, Oregon.

FIRST AND SECOND POINTS

These points may be considered together because the cases usually apply to both. We think, however, that no discussion is called for because this Court has so recently reviewed the questions and reaffirmed many previous holdings to the effect that an attempted appeal to the Supreme

Court of a state from a decision of a lower court which in fact was the court of last resort in the state insofar as that particular case is concerned, is of no avail in the matter of tolling the statutory provision which limits the time for applying to this Court for a writ of certiorari, and that the petitioner is too late if three months have elapsed after the determination of the state court of last resort. We refer to *Department of Banking v. Fink,* ——U.S.—— 87 L. Ed. "Advance Opinions", pp. 218, 220, and cases there cited.

Counsel for petitioner at page 3 of the petition cites several cases to the effect that the judgment of the Circuit Court did not become final under the appellate procedure of Oregon until September 22, 1942, when the Supreme Court of Oregon dismissed the appeal. The cases referred to, however, apply only in cases where the highest court of the state had a discretionary power to entertain the appeal or not to entertain the appeal. But such is not the case in the matter here before the Court because the Supreme Court of Oregon had no power whatever to entertain the appeal of Mrs. McSparran from the Circuit Court for Multnomah county. The Supreme Court of Oregon could do nothing but dismiss the appeal, and this it did.

The case of *Western Union Tel. Co. v. Hughes,* 203 U.S. 505, 51 L. Ed. 294, which is relied upon by the petitioner is squarely in point in favor of the respondent in this matter. Many later cases to the same effect might be cited, but it

seems sufficient to refer to the following: *Western Union Tel. Co. v Priester,* 276 U.S. 252, 48 S. Ct. 234, 72 L. Ed. 555; *Chicago Etc. Co. v. Industrial Com.,* 284 U.S. 296, 52 S. Ct. 151, 76 L. Ed. 304; *McMaster v. Gould,* 276 U.S. 284, 48 S. Ct. 299, 72 L. Ed. 574.

The petitioner might have protected herself by obtaining an extension of time as provided by Sec. 315 of 28 U. S. C. A., for she had ample warning of danger by the motion to dismiss. This was in ample time for the petitioner to have obtained an extension of time, and then filed the petition for writ of certiorari in this Court within the extended time when it became apparent that the Supreme Court of Oregon would not pass upon its jurisdiction before an expiration of the time. As matters now stand we respectfully submit that this Court is without jurisdiction to entertain the petition.

THIRD POINT

THE RECORD IN THE CIRCUIT COURT FAILS TO SHOW THAT A FEDERAL QUESTION WAS SUBMITTED. THUS, THE PETITION FOR A WRIT OF CERTIORARI FAILS TO SHOW JURISDICTION IN THIS COURT.

If the petitioner intended to raise a federal question in the Circuit Court she should have moved for a dismissal of

the case, as she moved in the Municipal Court, and she should have specified definitely in what particular her constitutional rights under the 14th Amendment were impaired, or she should have objected to any evidence against her, particularly specifying the provisions of the Federal Constitution under which she claimed protection and the particulars in which her constitutional rights were impaired. She did neither.

However, the bill of exceptions (Tr. pp. 59 and 60) shows that the trial was had in the Circuit Court de novo, that a jury was waived, and that the petitioner "challenged the constitutionality of the ordinance involved upon the grounds that the enforcement of the same infringed the defendant's constitutional right to freedom of the press, freedom of speech, and freedom of religion, in support of her motion for a directed verdict and her case and cause."

Manifestly, inasmuch as a jury was waived there could be no motion for a directed verdict. But let us suppose that she intended to move for a dismissal of the case (and a recital appears in the Judgment Order that she "urged a substantial federal question as to the constitutionality of the ordinance in question, both on its face and as construed and applied as a denial of freedom of the press, freedom of speech and freedom of worship").

The motion (whether one or the other be taken) is insufficient because it failed to point out in what particular

her right to freedom of the press, freedom of speech and freedom of religion was involved.

In *Honeyman v. Hanan,* 300 U.S. 14, 81 L. Ed. 476, this Court passed upon two points both of which apply in this case and show that the record is insufficient to confer jurisdiction. There as here the record failed to show that a question under the Federal Constitution was directly raised and passed upon by the State Court and that a certificate or statement by the State Court that a federal question had been presented to and necessarily passed upon by it, is not sufficient where the record of proceedings at the trial fails to disclose that a federal question was presented and passed upon by the Court. This Court, speaking by the then Mr. Chief Justice Hughes, said: (p. 18 of 300 U.S.) "Before we may undertake to review a decision of the court of a state, it must appear affirmatively from the record, not only that the federal question was presented for decision to the highest court of the state having jurisdiction, but that its decision of the federal question was necessary to the determination of the cause. * * * As this Court must decide whether it has jurisdiction in a particular case, this Court must determine whether the federal question was necessarily passed upon by the State Court. *That determination must rest upon an examination of the record. A certificate or statement by the State Court that a federal question has been presented to it and necesesarily passed upon, is not controlling."*

Referring now to the recital above quoted from the bill of exceptions and the recital in the Judgment Order, it will be seen that neither is supported by anything in the transcript of proceedings at the trial.

Similar rulings were made in *Lynch v. People of the State of N. Y.,* 293 U.S. 52, 79 L. Ed. 191, in *State of Minn. v. National Tea Co.,* 300 U.S. 551, 84 L. Ed. 920, in *City of New York vs. Central Savings Bank,* 306 U.S. 661, 83 L. Ed. 1058, and in *Hughes v. Wendel* 87 L. Ed. "Advance Opinions" 130, and cases there mentioned. See also the annotations following the Minn. case as reported in L. Ed. beginning at p. 925, and notes in 63 L. R. A. 33, 329 and 471, and notes following Sec. 347 in 28 U. S. C. A.

The ordinance provided, "It shall be unlawful for any parent, guardian, custodian or person having charge or control of any boy under the age of ten years or of any girl under the age of eighteen years, to permit any such boy or girl to sell, expose, or offer for sale on any street any newspaper, magazine or periodical * * * ". (Tr. p. 77, Defendant's Ex. 6).

Now, if we assume that a motion was made in the Circuit Court similar to that made in the Municipal Court, we find that freedom of speech, freedom of the press and freedom of worship are mentioned, but there is no mention made of the manner in which it is claimed that this ordinance violates any of these freedoms, and there is nothing in the transcript

of record to indicate that Mrs. McSparran's freedom of the press, her freedom of speech or her freedom of worship, is in any way violated by the ordinance. The record fails to show that she made any claim that any of *her* freedoms were violated by the ordinance. She did not claim that the freedom of the presses of the Watch Tower Bible and Tract Society, Inc., were impaired by the ordinance, or that the freedom of speech of herself and children was impaired by it, or that the religious freedom of herself was impaired. She has no standing in court to claim that the ordinance is unconstitutional because the rights of the Watch Tower Bible and Tract Society, Inc., or the rights of her children are impaired.

"One of the elementary doctrines of constitutional law, firmly established by the authorities, is that the constitutionality of a legislative act is open to attack only by a person whose rights are affected thereby." (11 Am. Jur. 748, "Constitutional Law", Sec. 111.)

The petition for a writ of certiorari complains that the judgment of the Circuit Court is erroneous (1) because it "abridges and denies petitioner's rights to bring up her children in the nurture and admonition of the Lord and direct the spiritual welfare of said children * * * " and (2) because it "abridges and denies petitioner's and her children's rights of freedom of speech, press, and worship * * * ".

The record shows that the first ground of error was not raised in or presented to the Circuit Court. It is therefore not available to the petitioner at this time. Yet it is the only basis of the argument submitted in support of the petition. The second ground of error is the only ground of complaint that is claimed to have been presented to the Circuit Court, and it is not available in support of the petition because it does not appear to have been made so as to be properly included in the transcript of record for this Court,— and, if it were properly in the record, it would be of no avail because the record fails to show that either of the three freedoms mentioned is impaired by the ordinance *in so far as Mrs. McSparran is concerned. Her* rights to sell or distribute the magazines, to worship, to speak and to print are not affected. The fact is, as shown by the argument accompanying the petition, that her "right" to have the children sell or distribute the magazines is the only right (if it be a right) that has been impaired. Yet, strangely enough, she made no mention of this alleged impairment at the trial in the Circuit Court. On the contrary she testified that she never instructs her daughters to display and distribute the Watch Tower on the streets, and that, "They go gladly and willingly, and *I have taught my children* in the culture and admonition of the Lord and they understand that it is their duty toward their Creator." (Tr., pp 24 and 25,—italics supplied).

The children corroberated Mrs. McSparran's testimony. (Tr. pp. 44 and 48).

In view of the above we respectfully maintain that the record fails to present a federal question in support of the petition.

FOURTH POINT

THE ORDINANCE IS AN EXERCISE OF POLICE POWER AND NOT INVALID UNDER THE 14TH AMENDMENT OF THE FEDERAL CONSTITUTION.

The record brought to this court fairly shows, as we think, that the ordinance is a reasonable exercise of the police power. Its object is to enable children to engage in recreation and play with other children of their age, thus affording them better health, co-operation in acting with others, quicker mental and physical reaction and generally a more favorable outlook upon life than results when a child is deprived of these opportunities, and required, as in the case of Mrs. McSparran's children, to stand on the streets for long periods of time holding in their hands for sale or distribution magazines and carrying bags containing magazines on which is written "Watch Tower and Consolation, 5 cents each" (Tr. p. 21).

Moreover, a child who stands on a crowded street is

subject to possible, indeed probable, injury, especially at times when people are intent upon reaching their homes, reaching their offices or other places. A child (especially a girl) does not have sufficient stature and strength to fend against men and women who are in a hurry.

It is insufficient to say that Mrs. McSparran accompanied her girls, on the occasion of her arrest, and that she would have protected them against injury. The ordinance is necessarily drawn without reference to the protection of mothers, and it is not certain that the mothers would be with the children at all times and be able to protect them.

Yet again,a child, especially a girl of tender years, who is on the street without a parent or guardian is subjected to temptation and danger of being lured to a place where she will meet with foul treatment.

There is also in this ordinance the thought of keeping children at or about their homes or schools and to keep them from being exploited by careless parents who seek to obtain the money that the children may earn.

The council of the City of Portland was and is clothed by the legislative assembly of the state of Oregon with authority to exercise the police power of the state of Oregon within the boundaries of the city to the full extent that the legislative assembly itself might exercise such power [see Sp. Or. Laws 1903, page 26, sec. 72, subdiv.. (1)].

We quote:

"The council has power and authority subject to the provisions, limitations and restrictions in this chapter contained:

(1) To exercise within the limits of the City of Portland all powers commonly known as the police power to the same extent as the state of Oregon has or could exercise said power within said limits."

This charter provision is in sec. 34 of the 1913 compilation, at page 25 of the 1926 compilation, and in sec. 2-105 of the 1942 compilation. See also *Slovanian, Etc. Ass'n v. City of Portland,* 111 Or. 335, 357, 225 Pac. 1098; *Baggage, Etc. Co. v. City of Portland,* 84 Or. 343, 352, 164 Pac. 570, LRA. 1917F 1080.

The petitioner in this case has introduced a group of ordinances including the one here challenged, all of which appear very clearly to have been passed under the police power and for the protection of children. We refer to the ordinances (Ex. 6, p. 75 of Tr.) making it unlawful to give, furnish, loan or sell to any minor under 18 a pistol, firearm or instrument capable of receiving or discharging any cartridge, etc., or to give, furnish, loan or sell to any such minor ammunition, etc., and (p. 76) unlawful to give, furnish, lend or sell to any minor under 18 any dart having a sharp metal tip or point designed or adapted to be thrown, etc., and unlawful for any parent or guardian of any minor under 16, or for any manager of any public entertainment where

an admission fee is charged, to permit such minor to participate in such public entertainment, and unlawful for minors to be on the streets after certain hours unless accompanied by parent, guardian or other proper companion specially chosen by the parent or guardian to escort the child (p. 81).

And in the same ordinance which contains the provisions that are challenged in this case, it is made unlawful for any minor to sell, expose or offer for sale any newspaper, magazine or periodical in any bawdy house, or on any car (p. 78), and by another ordinance, it is made unlawful to sell, barter, trade or give, or in any manner furnish, to any minor under 21 any tobacco, cigar or cigarette, etc., or to rent, hire out or allow the use of any canoe to any person under 18 years of age for use upon the Willamette river (pp. 78 & 79).

The ordinance here challenged is manifestly for the public welfare, to the end that children may become good citizens who are alert, co-operative, strong, healthy and capable. A child who engages in sports with other children becomes reasonably tolerant of others, alert, cooperative, resourceful, strong, healthy and thus likely to become a good citizen, while a child who is overworked is likely to become stolid, stunted, unhealthful, incapable, lacking in cooperation, resourcefulness, and unreasonably intolerant toward others, and especially if such child be taught from infancy that he or she must be a preacher of the Gospel, stand on the streets and hold up magazines for sale, and

become a messenger of THEOCRASY and thus assist in teaching that all religions are the works of Satan; that all governments are wicked and instrumentalities of Satan, that all Christians (other than Jehovah's witnesses) are servants of Satan and condemned to utter destruction. Later in this brief we will show some of the baneful effects which have resulted from a training of children to work in this service of "preaching the Gospel of God's Kingdom" as expressed by Jacqueline McSparran (Tr. p. 44).

We hardly need cite authorities to show that the 14th Amendment is not designed to, nor is it so construed or applied, as to prevent the enactment of such legislation under the police power. For a compilation of cases in this court on the subject we refer to U.S. Sup. Ct. Rep. Dig. vol. 4, pp. 2150 and following, and Pocket Supp. pp. 125, and following, also Or. Sup. Ct. cases in the annotations following the 14th Amendment to the Federal Constitution as given in Oregon Compiled Laws Annotated, vol 9, pp. 34 and following.

Children are wards of the State and especially subject to an exercise of police power notwithstanding the wishes of parents to the contrary.

In *State v. Shorey,* 48 Or. 396, 86 Pac. 881, it appears that the defendant was charged with violating a statute which restricted the employment of children to certain hours. The Supreme Court of Oregon, referring to the 14th Amend-

ment of the Federal Constitution and to section 1 Article I of the state Constitution, where it is declared that "all men when they form a social compact are equal in rights," said:

> (Page 398 of 48 Or.) *"These constitutional provisions do not limit the power of the state to interfere with the parental control of minors,* or regulate the right of a minor to contract, or of others to contract with him: 2 Tiedeman State & Fed. Con. sec. 195. It is competent for the state to forbid the employment of children in certain callings merely because it believes such prohibition to be for their best interest, although the prohibited employment does not involve a direct danger to morals, decency, or life or limb. *Such legislation is not an unlawful interference with the parents' control* over the child or right to its labor, nor with the liberty of the child: *People v. Ewer,* 141 N.Y. 129 (36 N.E. 4, 25 L.R.A. 794, 38 Am. St. Rep. 788).
>
> *They (children) are wards of the state and subject to it's control. As to them, the state stands in the position of parens patriae, and may exercise unlimited supervision and control over their contracts, occupation and conduct, and the liberty and right of those who assume to deal with them. This is a power which inheres in the government for its own preservation and for the protection of the life, person, health and morals of its future citizens. 'It has been well remarked,' says Mr. Justice Gray in People v. Ewer, 141 N.Y. 129 * * *,' that the better organized and trained the race, the better it is prepared to hold its own. Hence it is that laws are enacted looking to the compulsory education by parents of their children, and to their punishment for cruel treatment, and which limit and regulate the employment of children in the factory and work shop to prevent injury from excessive*

labor. It is not and cannot be disputed that the interest which the state has in the physical, moral and intellectual well-being of its members warrants the application and the exercise of every just power, which will result in preparing the child, in future life, to support itself, to serve the state and in all the relations and duties of adult life to perform well and capably its part.'

"The supervision and control of minors is a subject which has always been regarded as within the province of legislative authority. How far it shall be exercised is a question of expediency and propriety which it is the sole province of the legislature to determine. The judiciary has no authority to interfere with the legislature's judgment on that subject, unless perhaps, its enactments are so manifestly unreasonable and arbitrary as to be invalid on that account."

See also *State v. Muller,* 48 Or. 252 254, et seq. (Same case in this Court, 208 U.S. 412, 52 L. Ed. 551.)

The fact that each state in the United States is the *parens patriae* of the children in the state is further shown by the opinion of Mr. Justice McLean (1854) in *Fountain v. Ravenel,* 17 How. 369, 15 L. ed. 80, where at page 86 it is said:

"In *Wheeler v. Smith* (9 How. 55) this Court said: 'When this country achieved its independence the prerogative of the crown devolved upon the peoples of the states, and this power still remains with them except so far as they have delegated a portion of it to the federal government. The sovereign will is made known to us by legislative enactment. *The state as a sovereign, is the parens patriae.'* "

Mr. Chief Justice Taney in a concurring opinion said (page 90 of 15 L. ed.):

> "The second section of the article of the Constitution declares that the judicial power of the United States shall extend to all cases in law and equity specified in the section. These words obviously confer judicial power and nothing more; and cannot, upon any fair construction, be held to embrace the prerogative power, which the king as *parens patriae,* in England exercised through the courts. And the chancery jurisdiction of the courts of the United States, as guaranteed by the Constitution, extends only to cases over which the courts of chancery had jurisdiction in its judicial character as a court of equity. The wide discretionary power which the chancellor of England exercises over infants or idiots or charities has not been conferred. *These prerogative powers which belong to the sovereign as parens patriae, remains with the states."*

Parenthetically, it may be noted that in 1924 an attempt was initiated to obtain a constitutional amendment known as the Child Labor amendment (43 Stat. L. 670) authorizing Congress to limit, regulate and prohibit the labor of persons under 18 years of age, and suspending state laws to the extent necessary to give effect to legislation enacted by Congress. See in this connection *Coleman v. Miller,* 307 U.S. 433, 83 L. ed. 1385, 59 S. Ct. 972, 122 A.L.R. 695 and 697).

Child labor laws have been universally upheld as may be seen from the annotations in 12 A. L. R. 1216, 72 A. L. E. 137, 142, 90 A. L. R. 814, 96 A. L. R. 1353, 33 A. L. R. 1397,

Ann. Cas. 1913E 339, 9 Ann. Cas. 1005, 15 Ann. Cas. 470, 120 Am. St. Rep. 885.

PRESUMPTION OF CONSTITUTIONALITY

" * * * There is a strong presumption that a legislature understands and correctly appreciates the needs of its own people, that its laws are directed to problems made manifest by experience, and that its discriminations are based upon adequate grounds," (11 Amer. Jurisprudence 794, "Constitutional Law", Sec. 131).

" * * * To doubt the constitutionality of a law is to resolve every or all doubt in favor of its validity * * * ". (Above authority pp. 780 & 781).

"* * * It is only where its invalidity is made to appear clearly, plainly, palpably, and by irretrenchable evidence, where the case is so clear as to be free from doubt, or the act is manifestly in contravention of the constitution, and where all in all invalidity is disclosed in such a manner as to leave no reasonable doubt, that the courts will declare it unconstitutional." (Above authority pp. 786-788).

The above rules apply to city ordinances. (Same authority p. 798).

"Mere unreasonableness does not necessarily render a statute unconstitutional. This rule does not mean that constitutional guarantees can be violated by unreasonableness.

Thus the court may inquire whether an act of Congress is arbitrary or capricious, that is whether it has reasonable relation to a legitimate end. If, however, there is room for fair debate as to whether a municipal ordinance is arbitrary or unreasonable, the court will not substitute its own judgment for that of the legislative body charged with the primary duty and responsibility of determining the question." (Above authority pp. 802 - 808).

"* * * All questions of policy are for the determination of the legislature, not for the courts." (Above authority, p. 815)

The above principles are supported by many decisions of this court as well as by many decisions of state courts. They are especially applicable to the case here at bar, because the question was peculiarly one for the local legislative body to determine; whether conditions on the city streets were such that mothers and fathers should permit their young children to sell or distribute magazines, periodicals or other literature thereon, and whether the health of the community will be better preserved by giving the children periods of rest and recreation, while not in attendance at school, and whether children will grow up into better manhood and womanhood, and be better citizens and more capable to cope with the difficulties of life by having their childhood blessed by some of the more cheerful and happy things of life which come from association with other child-

ren in the playing of games, and obtaining of recreation in the fresh air.

It is possible that a loving mother may be so fanatical or so enthusiastic along certain lines or so ignorant concerning the importance of recreation and play for children as to urge or require them to perform tasks which constitute an unfair hardship and burden and injure them for life. As between the legislative power of the State and the authority of the mother or father, or both combined, over young children, the State has the first and paramount right to provide for bringing up children in a way that will be most likely to produce healthy, strong citizens who have a cooperative spirit and who are fairly tolerant of the opinions and beliefs of others.

The thought that a mother has done her duty and is to be commended when she has trained her children (as Mrs. McSparran claims to have done) in the "nurture and admonition of the Lord" so that they will prefer to stand for long periods of time on a street holding up a magazine for sale or distribution in place of engaging in recreation and sports with other children, and that her children while so standing on the street and holding up these magazines are worshipping Jehovah, is a misconceived thought, born of ignorance and fanaticism,—a misdirected service in the interest of a great publishing house.

As between the state and cities, to which the state has

given proper legislative power, and the mothers or fathers of children, the state or city has undoubted paramount control. Otherwise the state would be unable to prevent fanatical mothers and fathers from murdering their children in supposed worship of their God or Great Spirit.

The United States did not commit suicide when the 14th Amendment was adopted. The people of the Oregon Territory, by adopting constitutional provisions for the four freedoms (press, speech, religion and worship), did not nullify the provisions which vest in the legislative assembly power to legislate upon all matters concerning the welfare of the people within the state and did not nullify the powers given to the courts to administer justice. All of the constitutional powers must be considered and construed together. The result is that the legislative branch of the government may pass laws restricting and limiting many things which would otherwise be regarded as natural or inherent rights. Thus legislation is valid which prohibits polygamy (*Reynolds v. United States,* 98 U.S. 145, 161, et seq., 25 L. ed. 244, 248; *Morman Church v. United States,* 136 U.S. 1, 34 L. ed. 481); which requires children to be vaccinated (*Jacobson v. Massachusetts,* 197 U.S. 11, 49 L. ed. 643; *State v. Martin,* 134 Ark. 420, 204 S.W. 622), which requires children who are sick to be properly treated notwithstanding a religious belief to the effect that treatment should not be applied (*People v. Pierson,* 176 N.Y. 201, 68 N.E. 243, 63

L.R.A. 187); which requires children to attend school; which requires that their teeth be properly cared for; which requires that they be taken away from parents who neglect them, etc.

Based upon the principle that each state is *parens patriae* of the children within its borders, the various states have enacted juvenile regulation for the more efficient control and supervision of children. In 31 Am. Jur. 787 "Juvenile Courts and Offenders", sec. 6, we read:

> "Such statutes have also been held not to be unconstitutional * * * *as unlawfully interfering with the relation of parent and child.* In many cases the courts have proceeded upon the theory that legislation respecting the commitment, care and custody of the inmates of reformal institutions for children is an exercise of the inherent power of the state as *parens patriae,* to interfere on behalf of infants, even between them and their parents, when the morals, safety, or interests of such children require it."

From the above it will be seen that the power of the state (and in this instance the City of Portland as a state agency) to enact and enforce legislation relative to the welfare of children notwithstanding the fact that some mothers may be very much opposed to the enforcement of the law, is not dependent alone upon an exercise of the police power but may be referred to the right of *parens patriae,* as explained by the supreme court of Oregon in the Shorey case, supra.

CASES CITED BY PETITIONER AND SOME OTHERS

No review need be here made of the cases cited in behalf of the petitioner. None of them is in conflict with the constitutional principles above stated. In fact they are all in support of the above principles. The case of *Pierce v. Society of Sisters,* 268 U.S. 510, 69 L. ed. 1070 is perhaps the strongest of the cases cited. The case involved a statute which made it unlawful to send children between 8 and 16 years of age to any school except a public school unless a permit for private education be obtained. Two school corporations (one being the Society of Sisters, and the other Hill Military Academy) filed suit to have the act declared unconstitutional, alleging that the complainants had large investments in school plants for children where educational work had been conducted for many years; that the primary departments were associated with other educational work so that the entire investment would be lost if the statute be held valid and thus the complainants would suffer irreparable injury; that their educational work was not inherently harmful but was useful and meritorious, and conducted along the same lines as the public schools in the state covering the same subjects and in compliance with the requirements of the state board of education, etc. The case came before the court on the sufficiency of the complaint, and it was held sufficient. The court, however, thus recognized the police power (p. 534 of 268 U.S.):

"No question is raised concerning the power of the

state reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils; *to require that all children of proper age attend some school, that teachers shall be of good, moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare.*"

In the case of *Meyers v. Nebraska,* 262 U.S. 300, 67 L. ed. 1042, the complainant had been convicted of teaching the subject of reading in the German language to a child 10 years of age who had not passed the eighth grade, thus violating a certain statute. The court found and held that the statute was arbitrary "and without reasonable relation to any end within the competency of the state."

We have no criticism to make against this case, or, in fact, any of the other cases cited in support of the petitioner. We wish, however, to briefly comment upon the New Hampshire cases,—which seem to be especially relied upon by her, (In Re Rowland Lefebvre, et al, 20 Atl. (2d) 185, and *State v. Richardson,* 27 Atl. (2d) 94).

The former of these cases (like the Gobitis case, 310 U.S. 585, 84 L. ed. 1375) concerned the validity of a school regulation which required a flag saluting exercise as a part of the school work. The Lefebvre children were expelled from school because of the refusal of their parents to allow them to join in this exercise. The children were subsequently

brought before the juvenile department of the municipal court of Nashua on a charge of being delinquent children *because they were not attending school.* The supreme court of New Hampshire held that the definition of delinquent children in the juvenile law was not sufficient to authorize the municipal court to uphold the charge. Notwithstanding the fact that the case was thus disposed of, the Court commented at some length about "freedom of religious concepts" and "civil liberties", all of which we think was *orbiter dicta* and we do not think the court would have thus commented if the court had been familiar with the activities of Jehovah's Witnesses and with the doctrines advanced in their magazines and books, especially the books entitled: "Religion", "Enemies", "Government" and "Children".

The other New Hampshire case involved a statute quite similar to the ordinance here involved. The defendant was charged with violating it by employing a boy under 10 years of age and permitting him to sell magazines on the streets. It provided that "whoever *employs* any child, and whoever permits or suffers any child *under his control* as parent, guardian or otherwise, to be employed or to work in violation of the foregoing provisions shall be guilty of a criminal offense." The court found from the evidence that the defendant (a leader of the group of Jehovah's Witnesses of which the boy and his mother were members) was not a parent, guardian or otherwise in control of the boy and did

not employ the boy, who like the McSparran children, went of his own accord with his mother to join in selling or distributing the magazines. Thus the law was not violated by the defendant and the Supreme Court so held. Here again the Court made comments along the line of those made in the Lefebvre case, all of which, as we think are *obiter dicta.*

A New Hampshire case more in point on the subject of the police power is *Cox v. State of New Hampshire* 91 New Hamp. 137, 16 A (2d) 508,—same case in this Court 312, U.S. 569, 85 L. Ed. 1049, 61 S. Ct. 762, 133, A.L.R. 1396, where several of Jehovah's Witnesses were found guilty of violating a statute which prohibited parades in a street without obtaining a license. Both the Supreme Court of New Hampshire and this Court held the statute valid. This Court said (p. 574 of 312 U.S.):

> "Civil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses. The authority of a municipality to impose regulations in order to assure the safety and convenience of the public in the use of public highways has never been regarded as inconsistent with civil liberties, but rather as one of the means of safeguarding the good order upon which they ultimately depend."

The report of this case shows that the witnesses were at the time of the parade carrying signs reading, "Religion is

a snare and a racket". See also cases in Annotations beginning at page 1404 of 133 A.L.R., and *People v. Burman,* 154 Mich. 150, 25 L. R. A. N. S. 251 and Annotations on pages 251-254.

In this connection we may mention a late case in the Superior Court of the State of Washington for Thurston County by *Lettie E. Stone v. Mack Stone,* No. 19826, a divorce proceeding, where the court awarded the defendant a divorce and the custody of the children, saying:

> "In awarding the custody of the children to the defendant, the Court does not mean to imply that the plaintiff is not a fit and proper person, morally, to have their custody, but she is a member of a fanatical organization with teachings entirely inimical to the rearing of children as American citizens. In fact the zealots of the cause insisted upon demonstrating, in court, *that they would not salute the American flag and that they did not believe in voting and it is apparent that any child raised in this atmosphere, could not become a loyal American.*"

Opinion dated May 20, 1942, by Judge D. F. Wright.

Other recent cases are: *Hamilton v. University of California,* 219 Cal. 663, 28 Pac. (2d) 355, 293 U.S. 245, 79 L. Ed. 343, where a statute was upheld which required students at the State University to take military training; and *Jones v. Opelika,* 316 U.S. 584, 86 L. Ed. 1691, where several city ordinances were upheld which made it unlawful

to sell magazines etc. on the streets without a license. These ordinances were attacked by some of Jehovah's Witnesses.

Other laws and ordinances recently brought under attack by Jehovah's Witnesses may be seen in *Hilley v. Spivey, Sheriff*, 162 S.W. (2d) 426; *Largent v. Reeves, City Marshal*, 162 S.W. (2d) 419, and *Killam v. City of Floresville*, 162 S.W. (2d) 429, all of which came before this Court on application for a writ of certiorari, but the writ was denied (see cases numbered 348, 349 and 350 in 87 L. ed. Adv. Opinions, p. 47).

In view of the comments made by the court in the New Hampshire cases and some of the references in other courts to Jehovah's Witnesses as following their *religious* belief and worship in the matter of selling or distributing these magazines on the streets and going from house to house to distribute or sell books and other literature put out by the Watch Tower Bible and Tract Society, Inc., a publishing house at 117 Adams St., Brooklyn, New York, we will here show the real character of this organization.

The genesis, organization and some activities of Jehovah's Witnesses (formerly designated Russellites from its founder, C. T. "Pastor" Russell, who began his activities in Pennsylvania about 1874) are given in Saturday Evening Post, September 14th, 1940, pages 18 and following. See also Encyclopedia of Religion and Ethics, vol XI, p. 286b, the magazines Consolation and Watch Tower introduced in

evidence in this case as Exhibits 1 and 2, Exhibit 3 shown on pp. 91 and 92 of the transcript, the testimony of Mrs. McSparran and of Norman Larson on pp. 17 - 42. From this it appears that the activities of Mrs. McSparran and other so-called Jehovah's Witnesses are controlled by the Watch Tower Bible and Tract Society, Inc., which issues a certificate (Ex. 3,—Tr. p. 91) referred to as an ordination "to preach the Gospel of God's Kingdom under Christ Jesus and is therefore one of Jehovah's Witnesses * * * sent forth by this society, which is created and organized and chartered by law to preach the Gospel of God's Kingdom, and that Jehovah's Witnesses are commanded to obey God by preaching the Gospel * * * and *that Jehovah's Witnesses are compelled to obey God rather than men* * * *. That in obedience to God's commands Jehovah's Witnesses preach the Gospel and worship Almighty God by calling on the people at their homes and exhibiting to them the message of said Gospel in printed form, such as the Bible, books, booklets and magazines, and thus afford the people the opportunity of learning of God's gracious provision for them." The document is issued over the facsimile signature of J. F. Rutherford, president.

The book called "Religion" is advertised on the back of the certificate (Tr. p. 92).

We think the court may take judicial notice of the general doctrine advanced through this book and other books writ-

ten by J. F. Rutherford, published by the Watch Tower Bible and Tract Society, Inc., and widely circulated by the activities of the Witnesses (31 C.J.S. 510 - 513, 516 - 519; 20 Am. Jur. 48 - 52). Mrs. McSparran testified that her occupation was an ordained minister to preach the Gospel of God's Kingdom (Tr. p. 17). Exhibit 3 and the magazines show that this occupation is selling or distributing on the streets and going about from house to house offering the books and other literature and playing phonograph records which give information concerning "God's Kingdom".

The magazines and books (see "Religion", "Government" and "Enemies", all by J. F. Rutherford) show that this Kingdom is different than the spiritual Kingdom contemplated usually by Christians. It is THE THEOCRASY which is said to have begun in 1914 and is very soon to be completed by the battle of Armagedon when our government and all other governments on earth will be overthrown.

These magazines and books show further that Jehovah's Witnesses must be loyal to THE THEOCRASY rather than to any other government, and for this reason and because there is a commandment in the Old Testament not to bow down to or worship any graven image, etc., the Witnesses must not salute the American flag or any other flag, vote at election or otherwise participate in governmental activities, but must devote their entire energy to the sale or distribution of literature which teaches that all religions and

governments are instrumentalities of Satan, the Wicked Serpent, etc. (see "Enemies" by J. F. Rutherford, first printing 1,000,000 copies, copyrighted 1937, pp. 67, 69, 71, 100, 101, 130 and 139, especially p. 100 concerning religion, pp. 327 and 335 concerning government and p. 73 concerning the mission of Witnesses; also "Religion" by J. F. Rutherford, 1,000,000-edition, copyrighted 1940, pp. 23, 44, 47, 60, 67, 72, 77, 79, 81, 89, 94, 96, 104, 107, 110, 121, 122 and 173, and "Government" by J. F. Rutherford, 2,457,500-edition, copyrighted 1928, pp. 34, 41, 270, 272, 274, 276, 279, 281, 308, 329 and 330). All of the books and magazines are printed by Watch Tower Bible and Tract Society, Inc.

Page 173 of "Religion" shows that this printing house had put out and the Witnesses had distributed 309,000,000 books and booklets in more than seventy different languages at the end of 1939.

The fact that the Jehovah's Witnesses organization is not a religious organization and should not be counted as such is shown by page 5 of the petition herein where it is said that the Watch Tower strictly adheres to the Bible, "being strictly free and separate from all religion * * *." It may be observed, however, from a reading of the Watch Tower and Consolation and checking the Bible references that in many instances the conclusions announced are dogmatic rather than warranted by any fair interpretation of the Bible text, and that those who believe in the doctrines of this

organization have the utmost scorn and intolerance toward all religions and religious teachers and preachers and but little less scorn for governments, government officials and men engaged in commerce designated as commercialists. It is little wonder that the playing of their records upon the streets and front porches of houses provoke wrath and sometimes breaches of peace.

ANSWERING SOME OF PETITIONER'S POINTS RE POLICE POWER

On page 5 of the petition and supporting brief it is said that the Watch Tower and Consolation magazines "are not subversive, nor do they advocate the use of force by other persons or anyone to overthrow the government." There may be a difference of opinion concerning the meaning of "subversive" in the matter of overthrowing the government, but we respectfully maintain that it is subversive for anyone to distribute on the streets or elsewhere magazines or other literature which advocates the doctrine that this government and all other governments are wicked instrumentalities of Satan and that all government officials are under the control of commercialists who act purely for selfish ends; that all religions are also instrumentalities of Satan and working hand in hand with the commercialists, the politicians and government officials for the purpose of oppressing the

people, and that all Christians are wicked and condemned to eternal death unless they embrace the doctrine of Jehovah's Witnesses, and that those who truly follow the doctrine of Jehovah's Witnesses cannot salute the country's flag or vote at any election or exercise any of the political duties of good citizens or take any part in defending the country against other countries which wage war upon it, and that they must violate the laws of the land whenever these laws come in conflict with what they conceive to be the law of God. We further maintain that the theory advanced that this government is about to be overthrown by *The Theocrasy* through the will and power of God without any human instrumentality is a time serving story which may be quickly converted into force, if numbers seem sufficient, as was the case at Jericho when besieged by the hosts of Joshua (Joshua 6:20 & 21).

On page 11 it is said that this case is "for the purpose of protecting the most sacred of all human rights from encroachment by misapplied laws." There is no contention on the part of the respondent in this case that a mother may not care for and instruct her children in the ways of right living but when a mother undertakes to follow "instructions", whether direct from Jehovah to her or through the medium of the Watch Tower Bible and Tract Society, Inc., which violate state or city laws for the public health, safety and welfare, and especially for the welfare of children, such

mother, as we maintain, is acting under misapprehension as to the laws of God, as well as violating the laws of man—at any rate, the present law of the land must control until *The Theocrasy* takes over, lest there be anarchy.

On page 13 it is said that the undisputed evidence shows that the petitioner did not profit from the activity of her children. This may be true in so far as money goes, but it is not true in so far as her well-being (according to her professed belief) is concerned, for it will be seen from the evidence in this case, the magazines, and the books above mentioned, that the petitioner, by distributing the magazines and having her children with her, is doing what she thinks is necessary in order to win life everlasting upon this earth and have a part in directing the affairs of *The Theocracy,*—a government which is supposed to correct all the ills of this and other governments, harness the power of the ocean waves, convert this power into labor-saving machinery for use throughout the earth, build a wonderful boulevard from the Pacific to the Atlantic oceans with many beautiful stopping places long its course, etc., etc.,—a real panacea.

On page 14 it is said that it is "the duty and privilege of parents and children to practice what they preach by consistently acting as Jehovah's witnesses before men." This may be accepted as true, except in cases where the man interpreted laws of God conflict with the laws of the land, in which case it is the duty of the mother to instruct the

children to follow the laws of the land rather than to follow what she or the Watch Tower Bible and Tract Society, Inc., or some of its officers may have relayed to her as the laws of God.

On page 15 it is said that there is no contention that "petitioner neglects her duty in bringing up the children." In this she is in error, for we maintain that it is a neglect of duty on her part to teach and bring up her children to violate a law or city ordinance like the one here under consideration.

On the same page it is said that there is "no evidence that there was a sale or that the children were offering or exposing for sale periodicals or magazines." She overlooks the fact that these magazines were held up by the children with the apparent purpose of attracting passers-by and that the children displayed canvas bags on which was written: "Watch Tower and Consolation, 5 cents a copy" (Tr. p. 21, and see p. 5 of petitioner's petition and brief). Moreover, the lower court found that the children were offering the magazines for sale and this finding, as we understand the law, is controlling in this phase of the case.

The theory that the children were giving away the magazines and receiving in return contributions of five cents each is an apparent subterfuge.

On page 16 it is said that the "petitioner's activity is

charitable and non-profit." We assume that there is no money profit to her but we do not make the same assumption with respect to the Watch Tower Bible and Tract Society, Inc. or its officers. She, however, has been induced to believe that she will obtain a greater profit than money by selling or distributing the magazines and thus gaining an everlasting life of joy.

In the case of *Cantwell v. Connecticut,* 310 U.S. 291, 84 L. Ed. 1213, 60 S. Ct. 900, 128 A.L.R. 1352 clearly illustrates the distinction between the rights protected by the 14th Amendment and the police power with respect to the activities of Jehovah's Witnesses. On the fifth count this court concluded from the evidence that the witnesses were not guilty of inciting to riot because they desisted playing the records as soon as they discovered that annoyance was caused. The court did not declare this statute unconstitutional.

CONCLUSION

From the authorities and facts above submitted it must be concluded as we submit (1) and (2) that this petition, if applying to the Supreme Court of Oregon, is not applicable, inasmuch as the Supreme Court of Oregon passed on no federal question, and, if the petition be deemed as applicable to the Circuit Court, it comes too late and there-

fore fails to afford jurisdiction to this Court; (3) that the record fails to show that a federal question such as that now asserted was definitely submitted to the Circuit Court and passed upon by the Court, and thus the record is insufficient to give this Court jurisdiction; and (4) that the question here submitted (if the Court may be regarded as having jurisdiction to consider it) is not a novel question, or one of importance such as to call for a review by this Court, but presents a question which is very definitely settled by the well established principles (a) that as to minors the state is *parens patriae,* and (b) that the police power fully warrants legislation for the protection of children like the ordinance here considered. The writ should, therefore, be disallowed.

Respectfully submitted,

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Office - Supreme Court, U. S.
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CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1942

No. 597

■

ADA McSPARRAN, *Petitioner*

v.

CITY OF PORTLAND, *Respondent*

■

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF THE STATE OF OREGON

Petitioner's
MOTION FOR REHEARING

HAYDEN C. COVINGTON
Attorney for Petitioner

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1942

No. 597

■

ADA McSPARRAN, *Petitioner*

v.

CITY OF PORTLAND, *Respondent*

■

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF THE STATE OF OREGON

Petitioner's
MOTION FOR REHEARING

MAY IT PLEASE THE COURT:

Now comes Ada McSparran, petitioner, and presents this her motion for rehearing within the time fixed by order of this Court extending time and as grounds therefor shows:

Grounds

1. This Court should have exercised discretionary jurisdiction because the state court below failed to hold that the ordinance as construed and applied abridges petitioner's rights of freedom to bring up children in the nurture and admonition of the Lord and to direct the spiritual welfare of said children and their proper worship of Almighty God JEHOVAH as directed in His Word, contrary to the First and Fourteenth Amendments to the United States Constitution.

2. This Court should have exercised discretionary jurisdiction because the state court below failed to hold that the ordinance as construed and applied abridges petitioner's and her children's rights of freedom of speech, press and worship of Almighty God, contrary to the First and Fourteenth Amendments to the United States Constitution.

3. This Court should have exercised discretionary jurisdiction because there are "special and important reasons" in that the court below has decided a federal question of substance of national importance not heretofore determined by this Court and *in a way not in accord with the United States Constitution.*

4. This Court should have exercised discretionary jurisdiction because the petition for writ of certiorari was timely filed, directed to the court possessing the record, to review the judgment of the Circuit Court of Multnomah County, Oregon.

DISCUSSION AND REASONS

Jurisdiction

The last ground is discussed first because if the conclusion is reached that the Court does not have jurisdiction then it is unnecessary to consider whether or not a substantial federal question is presented.

At the time of petitioner's appeal to the Oregon Supreme Court it was not settled that an appeal did not lie to that court to review the judgment. Dictum in the case of *Portland* v. *White,* 106 Or. 169, 211 P. 798, stated that where a constitutional question was presented an appeal would lie from the Circuit Court of a case originating in the Municipal Court. Because of the language and inferences of this case petitioner considered it necessary to exhaust her remedies by appeal in the state courts before bringing the case to this Court for review.

It was universally accepted among the bench and bar of Oregon at the time of the order dismissing the appeal in the case at bar that an exception existed allowing an appeal in the case of a constitutional question based upon the dictum in *Portland* v. *White,* supra.

Therefore it was at last the duty of petitioner to permit the Supreme Court of Oregon to express itself in the matter as to whether or not it would take jurisdiction. In *Kentucky* v. *Powers,* 201 U. S. 1, 37, this step is approved by this Court. Cf. *Bandini* v. *Superior Court,* 284 U. S. 8, 14. The cases relied upon by respondent against the jurisdiction of this Court[1] do not control here. They were cases dealing

[1] *Western Union Tel. Co.* v. *Priester,* 276 U. S. 252; *Chicago,* etc. v. *Industrial Com.,* 284 U. S. 296; and *McMaster* v. *Gould,* 276 U. S. 284.

with the question of whether or not the "writ" had been issued to the proper court. The only problem considered here is whether or not the petition is timely filed within 90 days from the date the judgment of the Circuit Court became final. The said judgment did not become final until September 22, 1942, the date of dismissal of the appeal. The petition is filed within three months of such date. The Supreme Court of Oregon says: "In the instant case, the circuit court is the highest state court in which a final decision could be had, and hence, the right of review above mentioned is not affected by the dismissal of this appeal. See authorities cited in annotations to said section 344 of the United States Judicial Code." R. 96.

The decision in *Largent* v. *Texas,* 63 S. Ct. 667, does not dispose of the question of whether or not this petition is timely. What was held there was that the judgment was final and the highest court was the county court. There the question of further review had been definitely settled in *Ex parte Largent,* 162 S. W. 2d 419, 421, prior to the judgment of the County Court. In Oregon at the time of the *McSparran* appeal, that State's Supreme Court had not clarified the law in the manner that the Texas Court of Criminal Appeals had done.

Litigants have the right to rely upon dictum of opinions of the highest court of the state in determining what step is required under the procedure of a state and until such dictum as to the procedure is overruled the taking of such course dictated by such dictum is proper; and the fact that the highest court of the state later denies legal effect to such dictum and overrules the suggested procedure of the state courts that existed prior to the decision overruling such dictum would control the question of whether or not the petition for certiorari is timely. Were the rule otherwise, state courts could repeatedly change the procedure and thus set snares and traps for litigants so as to deny them their rights to invoke the appellate jurisdiction of this Court

to protect rights secured under the Federal Constitution.[2]

The appeal was properly taken to the Supreme Court of Oregon on authority of *McMaster* v. *Gould,* supra, which held it necessary to apply to the Court of Appeals of New York from an order of the Appellate Division refusing further appeal. *Department of Banking* v. *Pink,* 63 S. Ct. 233, 235, does not apply here but sustains the direction of the writ to the Supreme Court of Oregon to review the judgment of the Circuit Court. The writ here is to be directed to the court possessed of the record, the State Supreme Court.

The Merits

Petitioner complained that the ordinance as construed and applied abridged her rights of freedom of speech and freedom of worship (or "religion"). (R. 2, 58, 60, 61, 66, 68) These rights include the right to educate and bring up her children in the "most holy faith" as Jehovah's witnesses, which had been impaired. Therefore grounds 1 and 2, page 11 of the petition for certiorari, are supported by the record. The petitioner had a right to exercise those two freedoms in the discharge of the duty of her relationship as mother to her children. It is her constitutional right to educate her children to be Jehovah's witnesses, which required the exercise of freedom of speech and of worship, and these rights have been impaired.

[2] *Missouri ex rel. Missouri Ins. Co.* v. *Gehner,* 281 U. S. 313; *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill,* 281 U. S. 673, 678-682; *People of New York ex rel. Bryant* v. *Zimmerman,* 278 U. S. 63, 70-71; *Rogers v. Alabama,* 192 U. S. 226, 230-231 (Motion to quash struck because prolix and verbose); *Davis* v. *Wechsler,* 263 U. S. 22, 24 (Waiver of venue by appearance); *Love* v. *Griffith,* 266 U. S. 32 (Appeal dismissed because moot question); *N. Y. C. Ry. Co.* v. *N. Y. & Pa. Co.,* 271 U. S. 124, 126-127 (Federal question not waived because of failure to appeal from former ruling); *German Savings & Loan Soc.* v. *Dormitzer,* 192 U. S. 125, 128 (Estoppel not sufficient); *Postal T. & C. Co.* v. *Newport,* 247 U. S. 464, 473, 475-476 (Res judicata, estoppel and waiver through agreement); *Brown* v. *Mississippi,* 297 U. S. 278 (Failure to move to exclude evidence); *Patterson* v. *Alabama,* 294 U. S. 600, 603-607 (Striking of motion for new trial and the bill of exceptions containing evidence); *Lawrence* v. *State Tax Com.,* 286 U. S. 276, 282-283.

CHILD LABOR LAWS of the sort involved here were designed to protect children from economic exploitation. They were not designed to invade the realm of education and raising of children by parents. The law in question is a restrictive measure, that is to say, a law that prohibits certain evils to children. It is not, therefore, an affirmatively constructive, or *positive,* measure of the legislature.

The ordinance in question is a part of the social legislation planned and enacted in the various states of the Union to prevent the *exploitation* of children in any line of work.

The right of the State to protect the children does not give the State a property right in or to the children, nor does the State have the right to invade the sacred field of obligation and relationship between parent and child and the family relationship. Those sacred relationships have been historically recognized as the very basis of society itself and without which mankind cannot exist, and would ultimately slide into barbarism of the worst kind.

It is true that statements can be found in the reports to the effect that the children are the wards of the State; but this does not mean that the State has absolute and unlimited control of all the children within its boundaries. This untenable, ridiculous position is claimed by the respondent, City of Portland, in its brief. There is a definite dividing line between powers of the State and the power of the parents in reference to the upbringing of children and providing education for such children. The proper field of the parent cannot be invaded by any sort of law *regardless of legislative declarations of policy* and recorded good motives behind the legislation.

This Court has uniformly held that every person within the boundary of the United States has an absolute constitutional right to marry, to pursue an occupation or calling of his own choice, maintain a home, raise children, teach his children in the way that they should go and direct their education and conduct. This was specifically held in *Pierce* v. *Society of Sisters,* 268 U. S. 510; *Meyer* v. *Nebraska,* 262

U. S. 390; *Allgeyer* v. *Louisiana*, 165 U. S. 578, 589; *Berea College* v. *Kentucky*, 211 U. S. 45, 67.[3]

Cf. *Skinner* v. *Oklahoma*, 316 U. S. 535.

The power of the State to require compulsory education and to direct the course of education of children in the public schools has been forced, in many instances, to yield to the stronger and more vital right of the parent to direct the education of the children in matters pertaining to the Bible and the faith or religion of such individuals.[4]

If the educational policy of the State must yield to the consciences of the children and parents then with equal force of reason it must be said that the power of the State to enforce restrictive legislation designed to curb child labor cannot be applied, and when applied must yield to the right of the parent to direct the child to engage in practices, service and worship voluntarily rendered by the child and considered (by both the child and its parents) necessary discharge of its obligations due the Creator.

Like any other constitutional right this right of bringing forth children, maintaining a family and directing the education of the little ones is not absolute. The State can intervene when and only when there is an *abuse* on the part of the parent of the exercise of the right, duty and privilege of controlling the child. There must be a positive showing that the parent's manner of exercising control over the child is an *abuse* of the right and so greatly jeopardizes the welfare of the child as to require intervention on the part of the State. It is admitted that there is no such *abuse* of the parental control in this case as would justify an invasion on the part of the State.

[3] For quotations from these cases that are pertinent here, see Appellees' brief in case of *West Virginia State Board of Education* v. *Barnette*, No. 591 October Term 1942, pages 42-44, 47-48.

[4] *People ex rel. Vallmar* v. *Stanley*, 81 Colo. 276, 282, 265 P. 610; *State ex rel. Finger* v. *Weedman*, 55 S. Dak. 343, 226 N. W. 348; *Spiller* v. *Woburn*, 12 Allen (Mass.) 127; *State* v. *Schieve*, 91 N. W. 846 (Nebr.); *Weiss* v. *School District*, 76 Wisc. 177; *People* v. *Board of Education*, 245 Ill. 324, 92 N. E. 251; *Herold* v. *Parish Board*, 136 La. 1034, 68 S. 16; *Hardwicke* v. *Board of School Trustees*, 54 Cal. A. 696, 205 P. 49.

Petitioner was not exploiting the children in any labor, commercial enterprise or pursuit. Neither she nor her children were engaged in any business. They were honestly and conscientiously engaged in preaching the Gospel of God's Kingdom and in discharging their covenant obligations to carry to others the message of God's Kingdom, The THEOCRACY, as the only hope of relief for the sufferings of humanity. By preaching publicly they were following in the footsteps of Jesus Christ and His apostles. The magazines which they were distributing related exclusively to explanation of Bible prophecy as understood and believed by petitioner and her children. This matter has been fully explained in the petition for writ of certiorari and the Court's attention is again directed to pages 4-7, 9-10, and 12-21 thereof.

If the doctrine contended for by respondent be sustained then family relationships will no longer be secure. Children can be pulled away from their mother's breast by legislative fiat and denied the nurture, comfort and admonition of parents and the warmth of fatherly and motherly instruction in all matters of human affairs and life, and of even the Bible, on the ground that the children are "wards of the State". This is a very dangerous, pernicious and alien fallacy and is a counterpart of the Nazi precept that the children are the exclusive property of the State and that the parents are only animal agencies to bring the children into existence for the benefit of the State.

It is not contended that the children of petitioner did not engage in sports with other children. The record does not show that they have been truant from school nor neglectful of studies. It is not contended that the children were not healthy or that the activity in which they engaged with their mother caused them to become stolid, intolerant and unresourceful. It is not shown that the activity in any way impaired the education, morals, welfare, physical or mental capacity, of the children. The only argument advanced against these children is that they are being brought up as

Jehovah's witnesses with baneful results to the children because such will cause them to be intolerant toward others. If this argument be sustained, then the children of all Catholics could be taken away from their parents in a predominantly Protestant community, or vice versa.

The State is shorn of all power and authority, therefore, to intervene in the Godly education by the parent of the child in the Bible and cannot interfere with the worship, service or Christian practices of the parent and child so long as such does not involve a violation of the law of morals or break out into overt acts against the peace and safety of the State and Nation. No such condition exists in the case at bar.

It is true that the State has the authority to prescribe compulsory education and punish children and parents for wilful truancy, dependency and delinquency, but no such condition exists here.

The power of control of the parent and especially that of the father over the children has been from time immemorial under the common law, the Roman law, the Hebrew law and the law of Almighty God, recognized as supreme. It was despotic until the child reached a certain age fixed by law or statute. These powers have been considerably relaxed to meet the change of the times, but even under the modern law the power of the parent as the natural guardian of children during minority has not been abrogated. During minority the parent has control over the person and property of the children except such property as is held in trust. Universally the father may restrain the liberty of children and even administer corporal punishment and the State cannot intervene or interfere by statute or criminal law unless such chastisement be excessive or cruel. Until quite recently the father had power to bind out his sons as apprentices and, though this right has generally discontinued under the law, the father is still entitled to the earnings of his minor child so long as the child remains at home and has not been emancipated. The issuance of licenses to marry

in cases of minors is generally forbidden unless parental consent has been given and marriages without such consent are voidable at the instance of the parent and as to certain legally defined ages some marriages are absolute nullities. With this power to the parent goes the obligation, enforceable by law, to support, maintain and provide for the needs of minor children.

The Court is well aware of these legal obligations and relationships between the parent and children but they are mentioned here for the purpose of emphasizing the fact that the State does not have absolute control, that is to say, the parent does not derive his authority over the children by virtue of any grant or allowance from the State, but that such powers of control over the children have been recognized as fundamental personal rights inherent with the parent from time immemorial.

Petitioner did not have her children on the streets on a day when their attendance was required at school, but petitioner and her children were upon the sidewalks of the City of Portland on Saturday, September 13, 1941, at about 9:30 a.m. This was a school holiday.

The respondent criticizes the two New Hampshire Supreme Court cases relied upon by petitioner, *In re Lefebvre,* 20 A. 2d 185, and *State* v. *Richardson,* 27 A. 2d 94, involving laws substantially identical with that questioned here. The facts in the *Richardson* case are directly in point with the facts here. In principle the *Lefebvre* case controls here. The respondent says that the Supreme Court of New Hampshire would not have favorably "commented if the court had been familiar with the activities of Jehovah's witnesses and with the doctrines advanced in their magazines and books", and then cites and quotes from the case of *Cox* v. *State,* 312 U. S. 569, 574, which is not at all in point here. It can be reliably stated that, aside from the Supreme Court of the United States, the Supreme Court of the State of New Hampshire knows more about Jehovah's witnesses than any other court in the United States because it has had

under consideration more cases involving Jehovah's witnesses than any other high state court.

Respondent quotes from the opinion of the judge of the Superior Court in the case of *Stone* v. *Stone,* involving one of Jehovah's witnesses who had the custody of her children taken away from her in a divorce proceeding on the ground that she was one of Jehovah's witnesses and taught her children to be likewise. (Page 28, respondent's brief) On January 25, 1943, that decision was reversed unanimously by the Supreme Court of Washington, 133 P. 2d 526.

The respondent leans heavily upon the doctrine of presumption of constitutionality of legislation, statutes and ordinances as a refuge from the constitutional assault against the illegal and unconstitutional application of this ordinance. To begin with we assert that the presumption of constitutionality cannot exist and does not prevail where an ordinance is attacked as being unconstitutional as construed and applied. This presumption should apply only where the statute or ordinance is attacked as being void on its face. It is uniformly the rule that where legislation is applied to activity of this character it comes directly in conflict with the provisions of the First and Fourteenth Amendments and immediately this presumption of constitutionality vanishes. The burden then falls upon the proponents of the legislation to justify an abridgment of the constitutional rights. The respondent has wholly failed to discharge the burden placed upon the City of Portland in this regard and has contented itself to criticize the doctrines and precepts of the Holy Bible as revealed to the people through Jehovah's witnesses. That sort of argument might pull the unsuspecting one away from the real issue but this Court will not be deceived and blinded to the true legal issue.

As a matter of fact when, as here, legislation is shown to abridge activity admittedly protected by the Constitution, there immediately results a presumption of unconstitutionality. This Court, in *Schneider* v. *State,* 308 U. S.

147, held that legislative preferences respecting matters of public convenience supporting application thereof to "other personal activities" would not justify application thereof to the four freedoms protected by the Bill of Rights and the Fourteenth Amendment. In the case of *Herndon* v. *Lowry,* 301 U. S. 242, this Court said:

> "The power of a state to abridge freedom of speech . . . [press and worship of Almighty God] is the exception rather than the rule and the penalizing even of utterances of a defined character must find its justification in a reasonable apprehension of danger to organized government. The judgment of the legislature is not unfettered. The limitation upon individual liberty must have appropriate relation to the safety of the state."

In *United States* v. *Carolene Prod. Co.,* 304 U. S. 144, 152, Chief Justice Stone, speaking for the Court, said:

> "There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth. See Stromberg v. California, 283 U. S. 359, 369-370; Lovell v. Griffin, 303 U. S. 444, 452.
>
> "It is unnecessary to . . . enquire . . . whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry."

If it be held that presumption of validity of legislation prevails in situations of this kind, then readily it becomes

apparent that the legislature can issue fiats and make declarations of policy, enforced with extreme penalties and punishment, prohibiting altar boys, choir singers, etc., regimenting the life and education of all children, invading the sanctity of the home and dictating to parents and to children alike as to the most delicate of all intricate human relationships, thus breaking down the dignity and sanctity of the American home, the backbone of democracy.

In these perilous times, with the rising tide of juvenile delinquency due to disruption of home conditions flowing from total war in which the Nation is engaged, it is more important than ever before to take every safeguard to maintain and preserve the family tie and relationships between parent and children. So important is this delicate and vital human relationship that the Office of Civilian Defense, through James M. Landis, Director, and the Children's Bureau of the United States Department of Labor are co-operating to stop the breakdown of family relationship by sustaining a nation-wide program of emphasizing the spiritual foundation of the family.

It is recognized that the place of Christianity and Bible instruction by the parent is the principal binding tie in establishing and maintaining the home and fulfilling family life. The interdependence of the parent and the Christian organization with which he is affiliated, as they seek common values and share in discharging the responsibilities of Bible education of the children, must be maintained. It is now admitted that the resources of the faith in Christianity must be mobilized to enable the people to meet the anxieties, privations, separations and bereavements that come from total war.

No child is expendable in the eyes of Almighty God through neglect of the parent to properly instruct him. By the law of Almighty God parents are obligated first to shoulder the task of educating the children and setting the example in morality, honesty, integrity, etc., which guides the children to maturity and soundness of mind.

There is no care so good and helpful as the care that devoted parents can give the children. The cold, disinterested arm of the State can never substitute for the warm embrace of loving father and mother. Legislative fiats and regimented instruction of paid instructors at state schools for delinquents cannot substitute for the nurture and admonition of a Christian father and mother which build the children's security to begin a well-balanced, normal, adult life.[5]

While the great majority of persons who adhere to "recognized" religions of America would not and do not agree with petitioner as to this method of worship of Almighty God indulged in by petitioner and her children, not one would have the hardihood to claim that this practice is an *abuse* of the fundamental right of a person to raise a family "in the Lord".

The approval of the conviction of this honest God-fearing parent because of her efforts to strengthen the faith of her children in Jehovah God is to make a mockery out of justice and the sanctity of family relationship in America. The conviction does not do honor nor lend credit to the nation-wide celebration of *National Family Week*, May 2-9, 1943, which is being backed and advanced throughout the Nation by the Office of Civilian Defense, and other civic organizations for the purpose of strengthening the morale of the people so as to strengthen the effort to preserve the sanctity of the family relationship during this hour of great peril.

[5] *In re Lefebvre*, supra.

Conclusion

If this Court dismissed the petition for writ of certiorari for want of jurisdiction because the petition was not filed within 90 days of the date of judgment of the Circuit Court of Multnomah County, Oregon, then, of course, it is beyond the power and reach of the Court to rectify the unlawful encroachment upon the liberties of petitioner, contrary to the Constitution.

However, if the Court denied the writ under its general discretionary powers [6] to refuse to review the judgment because there was no opinion on the merits by the Supreme Court of Oregon and because apparently the question is purely one of local concern, then it is important that the Court be appraised of the national implication of this question. If it is not settled in this case, it will have to be faced and settled in some future case, because *the problem is not local but entirely national in scope.* At present parents, Jehovah's witnesses, have been prosecuted or are threatened with prosecution under the Child Labor Laws in the states of Alabama, California, Massachusetts and Michigan. Prosecutions under statutes in those states involving the same facts as are involved in this case are gradually winding their way through the courts and will ultimately reach this Court. The quicker the issue is disposed of the better it will be for all concerned.

WHEREFORE, petitioner prays that the orders and judgments heretofore entered in the above entitled and numbered cause denying certiorari be set aside and held for naught and that on this motion for rehearing, the petition for writ of certiorari, and the supporting brief, the Court issue a writ of certiorari to the Supreme Court of Oregon, directing such court to certify to this Court for review and determination on a day certain to be therein named, a full

[6] *United States* v. *Carver,* 260 U. S. 482, 490; *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.,* 240 U. S. 251, 258; *Ohio ex rel. Seney* v. *Swift & Co.,* 260 U. S. 146, 151; *Atlantic Coast Line R. Co.* v. *Powe,* 283 U. S. 401, 403.

and complete transcript of the record and all proceedings in the case as numbered and entitled on the docket of said court, containing a copy of the judgment of conviction rendered and entered by the Circuit Court of Multnomah County, Oregon, against petitioner; and that the decree of the said Circuit Court convicting petitioner be reversed and that your petitioner have such other and further relief in the premises as to this Court may seem just and proper in the circumstances.

Respectfully submitted,

HAYDEN C. COVINGTON
117 Adams St., Brooklyn, N. Y.
Counsel for Petitioner

Certificate

I, Hayden C. Covington, do hereby certify that the foregoing motion for rehearing is prepared and filed in good faith so that justice may be done and not for the purpose of delay.

HAYDEN C. COVINGTON
Counsel for Petitioner